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No. 03-9659

IN THE
Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES and COMMON CAUSE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Johnson v. California*, 540 U.S. ___ (2004), and in the prior proceedings in this case, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in one thousand

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

communities and in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution — all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror, and in the earlier proceedings here, *Miller-El*, 537 U.S. 322.

Common Cause, Inc. was founded in 1970 as a nonpartisan advocacy organization that seeks to further the public interest. Common Cause has 250,000 members and supporters across the country and has organizations in 38 states, with a national office in Washington, DC.

Common Cause has worked throughout its 34-year history to ensure that the processes of government in all three branches are fair, open, and accountable to the public. It believes that racial discrimination in the selection of a jury, one of the fundamental processes of government, undermines our system of justice and, more broadly, the underpinnings of our democratic form of government.

Amici submit that their perspectives on the broad systemic and governmental implications of racial discrimination in jury selection differ from the immediate concerns of the parties and will be valuable to the Court in appraising the issues presented.

Introduction and Summary of Argument

Amici urge the Court both to grant *certiorari* in this case, and also ultimately to grant Miller-El relief in his favor.

Batson v. Kentucky and this Court's earlier decision in the present case, *Miller-El v. Cockrell*, required courts to give genuine attention to cleansing the criminal justice process of the taint of racial discrimination in jury selection. The response of the Fifth Circuit panel on remand in this matter, however, was to articulate new formulas — hardly differentiable from the old ones that this Court condemned — that excused patent race-based exclusion of an entire group of citizens from jury service.

The decision below constitutes a dangerous precedent that can only invite cynicism and disrespect for the law. Despite clear guidance from this Court about the relevance of Miller-El's evidence of discrimination and the proper way of analyzing it, the court below conducted an analysis that dismisses, miscasts, and minimizes that evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone, proves discrimination.

The result is that the panel dismissed proof of discrimination which can be characterized only as ***undeniable***. The historic and continuing racially biased jury-packing behavior of the prosecutors in Miller-El's case was not at all subtle or discreet; it was open and notorious. Despite this Court's explicit directive to consider it, the panel substituted a

curt dismissal of that history as inconsequential for its earlier view that it was irrelevant.[2] As wrong as this was in Miller-El's case, it also signals the failure of the panel to comprehend this Court's determination to end racial bias in jury selection. The only way to put the history of racial discrimination in criminal justice behind us in this country is to acknowledge its reality and remedy its wrongs insofar as those remain correctable, not to write it off as insignificant.

Amici urge this Court to grant review and to reverse the decision below, which perpetuates racial discrimination by turning a blind eye to its manifest reality. Racial discrimination in the selection of juries injures not only the defendant and the African-American (or other) citizens who are excluded from service, but the entire community and the very authority of government. Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. If courts condone glaring racial

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[2] "The Supreme Court stated that proof 'that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection' is 'relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions' in Miller- El's case. *Miller-El,* 537 U.S. at 347 . . . . In this case, however, the relevancy of this evidence is less significant because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case. This historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons. Here, however, as explained below the race-neutral reasons are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty. The state court, in the best position to make a factual credibility determination, heard the historical evidence and determined the prosecutors' race-neutral reasons for the peremptory strikes to be genuine. Under our standard of review, we must presume this specific determination is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." *Miller-El v. Dretke*, 361 F.3d 849, 855 (5th Cir. 2004).

discrimination in the courtroom, they teach the inevitable lesson that law is insincere or inept in its repeated avowals to afford equal justice to all.

When citizens of a defendant's race are disproportionately excluded from serving on his jury by the government officials prosecuting him, a legitimate perception of injustice arises. That perception cannot be dispelled by a perfunctory judicial review of his complaint of discrimination that inquires merely — as the panel did below — whether the prosecutors' articulated justifications for excluding each individual minority juror, viewed out of context, are plausible. A more critical examination of the prosecutors' actions, which considers all probative information about the circumstances of their exclusionary behavior and the record of the actors engaging in it, is essential. This Court said as much in Miller-El's case last Term, and it should grant review again to make clear that it meant what it said.

The proof of racial discrimination in this case is as strong as courts are ever likely to see. *Amici* urge the Court to send an unequivocal message to the lower courts that such discrimination violates *Batson* and will not be tolerated.

ARGUMENT

I. THE PANEL'S REASONS FOR DISMISSING THE "HISTORICAL" EVIDENCE OF DISCRIMINATION DEPRIVE HISTORY OF ITS PROPER PROBATIVE WEIGHT IN *BATSON* ANALYSIS AND SHOULD BE DISAPPROVED BY THIS COURT

At his capital trial in 1986, Miller-El objected to the prosecution's use of peremptory strikes "to exclude 10 of the 11 African-Americans eligible to serve" on his jury. *Miller-El*, 537 U.S. at 326. As this Court held, and as the State does not contest, "[a] comparative analysis of the venire demonstrates that African-Americans were excluded from petitioner's jury in

a ratio significantly higher than Caucasians were." *Id.* at 331. The prosecution used its peremptory strikes to exclude 91% of eligible African-Americans from Miller-El's jury, compared to 13% of eligible non-African Americans. *Id.* As this Court recognized last year, "[h]appenstance is unlikely to produce this disparity," *id.* at 342.

The issue to be determined by the state trial court under *Batson v. Kentucky*, 476 U.S. 79 (1986), was whether this disproportionate exclusion of African-Americans was race-based and therefore discriminatory or was the coincidental result of other factors. At a pre-trial hearing and again at a post-trial *Batson* remand hearing, Miller-El presented "extensive evidence" in support of his claim that the prosecutors' strikes were discriminatory. *Miller-El*, 537 U.S. at 328. The credibility of the prosecutors' race-neutral explanations for their strikes had to be assessed in light of all these "facts and circumstances," including those presented in support of a *prima facie* case. *Id.* at 340. Since the trial judge expressed doubt about the relevance of any evidence beyond the *voir dire* itself and never discussed any other evidence in reaching his decision,[3] *id.* at 329, it is highly unlikely that such evidence entered into his decision-making.

In *habeas* proceedings, although deference is due to the trial court's findings, "a federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 537 U.S. at 340. Here, as this Court recognized, "the culture of the District

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[3] The state trial judge admitted the evidence "in an abundance of caution" but made clear that he was not required to give it any weight whatsoever in his decision. *See Joint Appendix* in *Miller-El v. Cockrell* at 844 (hereinafter "J.A."). His written decision recites the evidence he considered — the "raw numbers" of strikes used; the "entire voir dire process" and "the explanations for the [strikes] . . . offered at trial and at the retrospective *Batson* hearing." J.A. at 876. The pattern and practice evidence is omitted from the list, and not mentioned anywhere else.

Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Id.* at 347. To ignore that ugly chapter of history does not erase it, but perpetuates it, creating the risk that it will be repeated as prosecutors realize that courts will not grant defendants relief from such misconduct. Yet the Court of Appeals on remand brushed the historical evidence aside through reasoning that would render such evidence of no avail in any case (see *infra* § I.A.) and despite its strong probative force (see *infra* § I.B). Had it given the historical evidence proper consideration, it would have been compelled to reach a different result — a holding that the prosecutors' strikes were based on race (see *infra* § II).

Despite its duty to do so, the court below never examined the extensive evidence submitted by Petitioner outside the facts of the trial itself to determine what light it might shed on the prosecutors' assertions that they had not discriminated. Its reasoning for dismissing the evidence is fundamentally unsound. An analysis which *includes* the evidence would have reached a different result — a holding that the prosecutors' strikes were based on race.

A. The Panel Below Discounted The Historical Evidence For Indefensible Reasons, Including An Unwarranted Degree Of Deference To The State Court's Slighting Consideration Of It

It should be noted at the outset that although the history of excluding African-Americans from jury service in Dallas extends back many generations before Miller-El's trial, (*see, e.g., Hill v. Texas*, 316 U.S. 400 (1942)), the "historical" evidence of discrimination presented by Miller-El extended up through the time of his trial and beyond. The powerful testimonial and statistical proof of a pattern and practice of discrimination included the five-year period immediately before Miller-El's trial. (See *infra* pp. 13-14). This was not ancient history. The "historical" evidence related to the policy and practice of the office prosecuting Miller-El during the period of

time when the particular prosecutors in his case were being trained and trying cases, and when Miller-El himself was tried.

The court below dismissed this evidence on grounds that make federal judicial enforcement of *Batson* virtually an illusion. First, although it acknowledged that in theory "historical evidence is relevant to the extent that it *could* undermine the credibility of the prosecutors' race-neutral reasons" for peremptory strikes, 361 F.3d at 855 (emphasis supplied), it never considered whether the historical evidence actually *does* undermine the prosecutors' credibility in this case. Rather, upon finding that "the race-neutral reasons [proffered by the prosecutors] are solidly supported by the record and in accordance with the prosecutors' legitimate efforts to get a jury of individuals open to imposing the death penalty," *id.*, the panel treated these findings as obviating any need to determine whether the purported race-neutral reasons were pretextual in light of all of the evidence.

In other words, if prosecutors — even those trained and accustomed to accomplishing racial discrimination in precisely this fashion — have sufficient ingenuity to develop "solid" arguments to support their explanation for peremptorily challenging a venireperson, and if the explanation "accord[s]" with some legitimate prosecutorial aim in jury selection, there is no necessity for reviewing courts to consider other evidence that might undermine the credibility of the explanation thus "supported," even when that other evidence was ignored entirely by the trial court, *see supra* note 3. This first ground for the holding below is akin to saying that "The prosecutor has produced some solid evidence that his motives are as he professes. We need not consider any evidence that they are not, because we already have evidence that they are."

Second, the court below reasoned that, because the trial judge "heard" the historical evidence and still found the prosecutors' race-neutral reasons to be "genuine," that evidence is insufficient to prove that the trial judge's finding of non-discrimination was incorrect (*see supra* note 2). By this

reasoning, reversals of any finding made after an evidentiary contest would be inconceivable: any evidence a trial court "hears" could not be considered as undercutting a trial court's findings, no matter that the evidence was not taken into account in the trial court's analysis nor how clearly erroneous its findings might be in light of the evidence.

Such complete and unquestioning deference disregards this Court's explicit admonition that "deference does not imply abandonment or abdication of judicial review." *Miller-El*, 527 U.S. at 340. And it is particularly unwarranted in a case where the trial judge never discussed the evidence at issue, *id.* at 329, and specifically indicated at the time he admitted it that he might not give it any weight at all.[4]

Moreover, the trial judge to whom the court of appeals is deferring is the only jurist among the more than a dozen that have reviewed this case whose comprehension of *Batson* is so deficient that he did *not* find a *prima facie* case of discrimination[5] — and even refused to do so on remand from a state appellate decision holding that such a *prima facie case* had been proven. *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Cr. App. 1988).[6] It is difficult to tell whether he simply misunderstood *Batson* or was so unreceptive to a claim of racial discrimination that he declined to consider compelling

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[4] *See* J.A. at 844.

[5] Even the State conceded in the prior proceedings in this Court that Miller-El had proven a *prima facie* case of discrimination. *See Miller-El*, 537 U.S. at 338.

[6] Not only did the trial judge not believe that a *prima facie* case had been proven, but he went so far as to hold that the extensive evidence presented "did not even raise an *inference* of racial motivation in the use of the state's peremptory challenges." *Miller-El*, 537 U.S. at 329 (emphasis added).

facts in support of the claim.[7] Either possibility casts doubt on his ability to weigh the evidence properly and make a legally correct finding under *Batson*. A more critical eye ought to be focused on a judge's findings when so glaring an error appears and was noted by this Court. But a critical perspective is wholly absent from the opinion below.

B. The Panel Disregarded Historical Evidence That Is Critical In Evaluating The Prosecutors' Assertions That Their Strikes Were Not Discriminatory

Amici will not review in detail all of the historical evidence presented to the trial court and discussed in this Court's prior opinion. A brief recapitulation of the evidence is set out at pages 12-14 below. But it is instructive to consider one example of the way in which disregarding that evidence can distort a court's assessment of the credibility of a prosecutor's purported non-racial reasons for his strikes — specifically, the prosecutors' explanations that jurors were struck because of attitudes concerning the death penalty.

The historical evidence shows that in the years immediately preceding Miller-El's trial, Dallas County prosecutors disproportionately struck African-Americans not just from Miller-El's jury, not just from the juries of other capitally charged African-Americans, not just from the juries of non-African-American capitally charged defendants, but from *all felony* cases for *all* defendants. (See *infra* p. 14.) Consistently with the training materials used in the Dallas District Attorney's office, African-American prospective jurors were excluded by the prosecutors across the board, in cases where

[7] At the conclusion of the original *Swain* hearing, after being presented with the training manual, the testimony of former prosecutors, the statistical evidence of exclusion, and testimony from judges and defense lawyers in support of the claim, the trial judge stated there was "*no evidence* presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." J.A. at 813 (emphasis added).

death-qualification was relevant and was conducted *and* in cases where it was not.[8]

By assessing the strikes in Miller-El's trial in isolation from what had happened in a multitude of other trials, the panel below ignored evidence that substantially undermined the prosecutors' explanations of their behavior in this case. "Death-qualification" fails as a nondiscriminatory explanation when exclusion by prosecutors consistently occurs in cases where death-qualification is neither necessary nor conducted.

By refusing to take account of this (and other) extensive, powerful evidence of racial discrimination in evaluating the prosecutor's explanations for using 10 of 14 peremptory challenges to exclude 91% of qualified African-Americans from Miller-El's jury, the panel undermined its own ability to reach any reasoned or realistic conclusion on the ultimate, critical issue of prosecutorial motivation. Worse, its ruling signals to those who "are of a mind to discriminate," *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), that they can do so with impunity. This extraordinary procedure is self-evidently perverse: it calls for *Batson* courts to close their eyes to evidence of pandemic, system-wide race prejudice that would have been judicially detectable under *Swain v. Alabama*.

II. THE PANEL'S EVALUATION OF THE EVIDENCE IN THIS CASE FLOUTS THIS COURT'S INTENTIONS IN *BATSON* AND PERPETUATES THE DISCRIMINATION THE COURT SOUGHT TO END

[8] This was shown by the testimony of prosecutors who worked in the office during the relevant period of time, as well as and testimony of judges and defense lawyers observing prosecutors in the courtroom

This Court aspired, through its decision in *Batson*, to end the pervasive and pernicious practice of excluding African-Americans from participation in the jury system. *Batson* was meant to stop the notorious practice of many state officials who professed a complete absence of racial motivation for their exclusionary actions but consistently discovered a whole host of reasons why African-Americans were unfit to serve.[9] When a court, such as the one below, feigns adherence to the rule of *Batson* but flouts its command through a "dismissive and strained" analysis of the evidence, *Miller-El*, 537 U.S. at 344, it is countenancing the continuation of that practice.

It is hard to imagine a *Batson* case with more overwhelming proof of discrimination than this one. As we have earlier pointed out, the panel below managed to overlook the obvious only because it ignored significant evidence, miscast the evidence it did consider, applied incorrect legal standards in assessing the latter evidence, and never looked at the body of evidence as a whole.

An analysis that weighed all of the evidence *cumulatively* to determine whether the exclusion of 91% of eligible African-Americans from Miller-El's jury was the product of racial discrimination would have framed the question more or less this way: With what degree of confidence can we say that these exclusions stemmed from a discriminatory motive and were not simply coincidental when we consider the evidence that

(1) the identical prosecutors exercising the strikes had been found to have discriminated in other cases in the same time

[9] *See, e.g.*, *Neal v. Delaware*, 103 U.S. 370, 397 (1880) (there were no qualified African-Americans); *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935) (none who qualified were known to State officials charged with composing venire lists); *Swain v. Alabama*, 380 U.S. 202, 221 (1965) (their views and beliefs made them less impartial, and thus legitimately subject to peremptory strikes).

period, including the case of Miller-El's co-defendant;[10] **and** (2) the tool they were found to have used to discriminate in one of those cases was used in this case;[11] **and** (3) they race-coded their jury cards in this case, *Miller-El*, 537 U.S. at 346; **and** (4) their office made it an explicit policy to exclude African-Americans from juries, as evidenced in its training manual, memos used in training, and the testimony of former prosecutors and judges, *id.* at 335; **and** (5) the prosecutors in Miller-El's case joined the office and were trained in the art of jury selection at a time "when assistant district attorneys received formal training in excluding minorities from juries," *id.* at 347; **and** (6) there was testimony that the policy was still in effect at the time of Miller-El's trial, *id.* at 334-35; **and** (7) all of the other African-American capital defendants against whom the same prosecutor's office obtained death sentences in the prior five years were tried by all-white juries;[12] **and** (8) in that same time period, out of 180 jurors in 15 capital trials, only 5 (3%) were African-American, while 56 of 57 African-Americans qualified to serve on those juries but excluded (98%) were barred by prosecutors using

[10] *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989); *(Dorothy Jean) Miller-El v. State*, 790 S.W.2d 351 (Tex. App. - Dallas 1990), *petition for discretionary review refused* (Oct. 17, 1990).

[11] "Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case. *Chambers v. State*, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989)." *Miller-El*, 537 U.S. at 345.

[12] See Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1, J.A. at 815.

peremptory challenges;[13] **and** (9) although the stated explanation for excluding African-Americans in Miller-El's case (*i.e.*, that those excluded were weak on the death penalty) applied only to capital cases, a study of 100 randomly selected felony trials between 1983 and 1984, *where views on the death penalty were not at issue*, indicated that *87% of African-Americans qualified to serve were excluded* by prosecutors using peremptories;[14] **and** (10) the prosecutors acted to exclude African-Americans from Miller-El's jury on sight — before they were even questioned — by "shuffling" the panels, *Miller-El*, 537 U.S. at 333-34, 346; **and** (11) there was testimony that prosecutors had used "shuffling" in the past "to manipulate the racial composition of the jury," *id.* at 346; **and** (12) the prosecutors questioned African-American jurors differently than white jurors in Miller-El's case both on the issue resulting in exclusion, *id.* at 332, 343, and on other issues, *id.* at 332, 344;[15] **and** (13) the reasons given for striking African-American jurors "pertained just as well to some

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[13] Qualified African-Americans had a one in twelve chance of being selected for a capital jury, while whites had a one in three chance. Timms & McGonigle, *supra* note 12, J.A. at 815-16.

[14] African Americans were excluded from felony juries at almost five times the rate of whites); 80% of African-American felony defendants were tried by all-white juries; although African Americans comprised 18% of the county, they were less than 4% of felony case jurors; 72% of felony juries had no African Americans; and a qualified African American had only a one- in-ten chance of serving on a jury, while a white had a one-in-two chance; see Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, J.A. at 698-99, 702-03.

[15] In prior proceedings, this Court "question[ed] the Court of Appeals' . . . dismissive and strained interpretation of petitioner's evidence of disparate questioning," *Miller-El* at 344. The Court unequivocally held that "disparate questioning did occur." *Id.* As Miller-El points out in his Petition for Writ of Certiorari, the Court of Appeals, despite this holding, still failed to find that disparate questioning occurred. Petition for Writ of Certiorari at 15-20.

white jurors who were not challenged and who did serve on the jury," *id.* at 343?

If one takes at all seriously the constitutional obligation of courts to root out discrimination in their own precinct, and if one looks at all of the evidence, there is no rational way to reach a conclusion other than that the exclusion of 91% of eligible African-Americans from Miller-El's jury resulted from discrimination and not coincidence.

The court below failed to reach this conclusion not only because it refused to look at the evidence as a whole, and not only because it improperly discounted the evidence of a continuous pattern and practice of discrimination by the prosecutors' office, but also because it incorrectly evaluated the evidence of jury shuffling, of disparate questioning, and of the seating of similarly situated white jurors. Its analysis on these latter issues is characterized by faulty reasoning and the erection of impossibly high — and erroneous — legal standards for proof of discrimination.

The panel below completely dismissed the evidence relating to the shuffling of the jury, even though this Court noted that "[o]n at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel." *Miller-El*, 537 U.S. at 334. "Shuffling" is a practice which "permits parties to rearrange the order in which members of the venire are examined," increasing or decreasing the likelihood that they might be empaneled by moving them into or out of the group to be questioned or dismissed. *Id.* at 333. Shuffling occurs "with no information about the prospective jurors other than their appearance." *Id.* at 333-34. In this case, the prosecutors not only shuffled the jury but also attempted to nullify a defense shuffle that moved African Americans forward, *id.*, citing violation of a rule the trial judge had never seen cited, let alone enforced, in twenty-five years in the county. *See* J.A. at 64-65.

The panel below offhandedly dismissed the prosecutors' use of the jury shuffle as evidence of intent to discriminate, citing the fact that Miller-El's lawyers also requested jury shuffles. The court doesn't explain how the defendant's request for a shuffle bears on the issue of what the *prosecutors'* intentions were in requesting shuffles. Its apparent equation of defense and prosecution shuffles reflects a disturbing confusion about the effect of shuffles at Miller-El's trial.

An attempt by an African-American defendant on trial for his life to make *possible* the *inclusion* of members of his own race on his jury cannot be equated with an attempt by the State to *exclude* such persons solely on the basis of their race. Miller-El's requested shuffles would have left in the pool African-Americans whose competence to serve would then be determined through *voir dire*, and who still would be subject to strikes by the prosecution or the defense. The State's shuffle permanently *excluded* African-Americans from the jury pool prior to any questioning and regardless of their qualifications. If the State successfully precluded participation by a group of people because of their race, in part through the use of the shuffle, the trial jury that convicted Miller-El was unconstitutionally composed and that conviction unconstitutionally obtained, no matter what motivated the defendant's request for shuffles.[16]

Miller-El's petition for certiorari contains specific examples of the panel's misleading analysis of the *voir dire* questioning of African-American and white jurors, and we need not rehearse that subject here. (See Petition for Writ of Certiorari at 20-26.) We write briefly on this issue only to raise concerns

[16] The court below may have been mistakenly viewing the defense shuffles as a discriminatory attempt to exclude white people -- but that is a statistical impossibility given the demographics. Even were the question a closer one, any concern about defense-sought shuffles cannot conceivably justify allowing Miller-El to be executed after conviction by a jury from which all African-American venirepersons were excluded by the prosecution's discriminatory shuffle and discriminatory peremptory strikes.

about what appears to be the lower court's standard for considering prospective jurors to be "similarly situated."

The court appears to be setting a standard that is impossible to meet: African-American and white jurors must be identical in every respect; they must use identical language to explain their thoughts and feelings, 361 F.3d at 859, and all of the possible race-neutral reasons for excluding them must exist in the same combination, *id.* at 859-60. Since this Court has said that virtually any race-neutral explanation is legitimate, *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (*per curiam*), under the approach taken below, a prosecutor could *always* evade a finding that jurors were similarly situated by carefully varying the race-neutral reasons articulated for various peremptory challenges, knowing that prospective jurors would not be considered "similarly situated" unless they had the same jobs, lived in the same neighborhoods, had children (or not) of the same ages, had spouses with the same jobs, had the same personal experiences with law enforcement (etc.), *in the same combination*.[17] No *Batson* challenge could ever succeed under such a standard, and this Court has never set such a standard.

[17] We only need one case to illustrate the variety of reasons prosecutors have employed to justify peremptory strikes against African Americans. In *Robinson v. State*, 773 So.2d 943, 949 (Miss. App. 2000), the State used 7 of 10 peremptory challenges to exclude prospective African-American jurors. Reasons proffered by the prosecution were 1) perceived hostility to the prosecution; 2) possible irresponsibility evidenced by the fact that questionnaires showed the jurors had children but were not married, although the prosecutor did not know whether the jurors were divorced or had children out of wedlock; 3) residence in a high crime area; 4) sleeping during voir dire; 5) not providing answers on the questionnaire, thereby creating uncertainty about ties to the community; 6) serving on a jury that acquitted. In *Robinson*, the court considered the totality of the evidence and concluded that *Batson* had been violated.

Conclusion

"Notwithstanding history, precedent, and the significant benefits of the peremptory challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded." *Powers v. Ohio*, 499 U.S. 400, 430 (1991) (Rehnquist, C.J., dissenting). Miller-El's was just such a jury.

The harm in this case is not just to Miller-El, but also to the African-Americans struck from jury service in this case, the African-American community in Dallas that lived through years of exclusion from jury service by the State, and the system of justice itself, which has been tainted by the discrimination injected by the prosecutors.

This Court's decision a year ago in *Miller-El* gave hope that the courts, following the Court's guidance, would take seriously their responsibility to scrutinize and remedy claims of racial discrimination in jury selection. The Court's opinion recognized the stark reality of the administration of criminal justice in Dallas in the 1980's, when Miller-El's trial took place. As the Court saw and said, "the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Miller-El*, 537 U.S. at 347. The opinion of the court below on remand, which minimizes, rationalizes and ignores that reality, must not be the last word. *Amici* respectfully urge that the decision below be reversed or vacated, and relief granted to the Petitioner Miller-El.

Respectfully submitted,

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